Ramba ak Bungkong & Ors v Asco Green Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(IM)(NCVC)-2507–12 OF 2017 AND Q-01(IM)(NCVC)-476–12 OF 2017
BADARIAH SAHAMID, RHODZARIAH BUJANG AND NOR BEE ARIFFIN JJCA
24 JUNE 2020

Civil Procedure — Preliminary question of law — Disposal of case on point of law — Judicial commissioner allowed application by plaintiff and third parties for case to be disposed of summarily — Whether action ought to go for proper trial — Whether questions of law suitable for determination without full trial — Rules of Court 2012 O 14A

Land Law — Customary land — Native customary rights — Whether plaintiff held indefeasible title — Whether defendants had any force of law against plaintiff — Whether defendants entitled to claim native customary rights over land — Whether defendants had any cause of action against third parties — Sarawak Land Code ss 5(2) & 132

These two appeals emanated from the decision of the learned judicial commissioner ('JC') in allowing the applications by the respondent ('the plaintiff') and the third parties. The plaintiff was the registered proprietor of the parcel of land ('Lot 130'). Lot 130 was formerly a provisional lease registered in the plaintiff's name. On 2 September 2014 the provisional lease was replaced with the issue of document of title for Lot 130. By a letter dated 7 January 2015 to the Chief Minister of Sarawak, the appellants ('the defendants') who were Iban by race together with Tuai Rumah Chabu ak Makum of Rumah Chabu, had asked for the revocation of the provisional lease. Later, the defendants led by the first defendant who was the Tuai Rumah of Rumah Ramba of Sungai Liam came to the plaintiff's camp on Lot 130 and stopped the plaintiff's contractor's workers from doing their work. The defendants claimed that they were at all material times the proprietors, occupiers, holders and claimants of native customary rights ('NCR') of the land situated at or around Sungai Liam which included Lot 130. They had created and/or acquired and/or inherited their NCR land since the 1830s and that Lot 130 was their reserved forest or pulau galau which had been reserved for many generations, well before the issuance of the title to the plaintiff. It was the plaintiff's pleaded case that despite the allegations, the longhouses of

Rumah Chabu and Rumah Ramba did not lie within the boundaries of Lot 130, nor did the defendants cultivate the said land. Sometime in July 2015, the defendants took possession of Lot 130. The plaintiffs claimed that the defendants had illegally entered into Lot 130 and was in wrongful occupation thereof. The plaintiff sought to recover the possession of Lot 130 and an injunction to restrain the defendants from entering the said land and damages. The defendants filed a counterclaim and sought several reliefs, amongst others, a declaration that they had created, acquired and inherited their NCR land since 1830s and that the issuance of Lot 130 to the plaintiff, in so far as the extent of the area under the said land overlapped and/or covered the defendants' NCR land, was unlawful, improper, unconstitutional and therefore null and void for want of extinguishment of the defendants' NCR over the said land. The defendants also filed third party proceedings, claiming in essence that the alienation to the plaintiff of Lot 130 was unlawful, unconstitutional and therefore null and void as the issuance of the title was without first obtaining their prior informed consent, and that the provisions of the Sarawak Land Code on compensation was not followed when there was no extinguishment of the defendants' NCR over Lot 130. The plaintiff and the third parties applied under O 14A of the Rules of Court 2012 ('the ROC') to have certain preliminary questions of law determined. The learned JC was of the opinion that the two applications were amply suitable to be disposed of summarily. The learned JC had struck out the defendants' defence and counterclaim against the plaintiff and allowed the plaintiff's claims. Similarly, the learned JC had struck out the defendants' statement of claim against the third parties. Hence, these appeals by the defendants.

Held, dismissing the appeals:

(1) The learned JC had rightly concluded that the undisputed facts and admissions made by the defendants as apparent from the pleadings and the affidavits, were comprehensive and sufficient to determine and dispose of the core issues in the claim. There was no substance in the defendants' contentions that their claims over NCR involved material disputes of facts that ought to go for a proper trial. The defendants had made several judicial admissions in their pleadings which stood on a higher footing than evidentiary admission. The admissions made by the defendants confirmed the plaintiff's contention that the longhouses of Rumah Ramba and Rumah Chabu did not lie within the boundaries of Lot 130. The pleadings did not show there were conflicting allegations of facts. There were no disputed material facts or facts which ought not to have been disputed that would render the application under O 14A of the ROC inappropriate. There were also no issues of fact interwoven with legal issues raised. The questions of law posed by the plaintiff and the third parties were clear cut and definite, discernible from the pleadings. The learned JC had correctly decided that the questions of law posed

were suitable for determination without the full trial of the action and such determination would be final as to the entire claim and the counterclaim (see paras 34, 36–37, 41 & 50–52).

(2) The defendant had not shown that their NCR had been created over Lot 130 in the manner prescribed under s 5(2) of the Sarawak Land Code. The alienation of Lot 130 to the plaintiff had already taken effect even before the defendants wrote to the Chief Minister vide a letter dated 7 January 2015 to ask for the revocation of the provisional lease. The defendants knew of the grant of provisional lease granted to the plaintiff since 22 July 2013 but did nothing to assert their NCR then. Despite the defendants' claim that their NCR over Lot 130 was created and/or acquired prior to 1 January 1958 and still subsisted as such, the defendants were not issued with any title over the land. Section 132 of the Sarawak Land Code pertaining to the plaintiff's indefeasibility of title remained applicable and the NCR claim did not defeat the indefeasibility of title of the plaintiff. There was no reason why the case must go for trial on this specific issue (see paras 58–59).

(3) Having considered all evidence and authorities, the defendant's pleadings and affidavits on the purported dealings they had with the timber company, so as to demonstrate the alleged control they exerted over Lot 130, had not made out the case they contended to be. As the decision in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 was overturned by the Court of Appeal, the defendants' contention that the decision represented the correct position of law pertaining to claims over NCR land was untenable (see paras 71 & 76).

(4) With the legal status of *pemakai menoa* and *pulau galau* having been firmly established by the Federal Court in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 to have no force of law, it followed that such customary practices did not create rights or ownership to Lot 130 and they could not be grounds for claims of NCR. Since the defendants did not have any NCR rights in or over Lot 130, any elements of extinguishment were not relevant. There was therefore no unconstitutional act by the third parties for the alleged claims made by the defendants. The JC was correct in his findings that the defendants had no cause of action against the third parties for claiming NCR over Lot 130 (see para 87).

[Bahasa Malaysia summary

Kedua-dua rayuan ini berasal dari keputusan pesuruhjaya kehakiman yang bijaksana ('JC') untuk membenarkan permohonan oleh responden ('plaintif') dan pihak ketiga. Plaintif adalah pemilik tanah yang berdaftar ('Lot 130'). Lot 130 sebelumnya merupakan pajakan sementara yang didaftarkan atas nama plaintif. Pada 2 September 2014, pajakan sementara digantikan dengan pengeluaran dokumen hakmilik untuk Lot 130. Dengan surat bertarikh 7 Januari 2015 kepada Ketua Menteri Sarawak, perayu ('defendan') yang berbangsa Iban dengan Tuai Rumah Chabu ak Makum dari Rumah Chabu, telah meminta pembatalan pajakan sementara itu. Kemudian, defendan yang diketuai oleh defendan pertama yang merupakan Tuai Rumah dari Rumah Ramba Sungai Liam datang ke kem plaintif di Lot 130 dan menghentikan pekerja kontraktor plaintif daripada melakukan kerja mereka. Defendan mendakwa bahawa mereka pada setiap masa material adalah pemilik, penghuni, pemegang dan penuntut hak adat anak negeri ('HAAN') tanah yang terletak di atau sekitar Sungai Liam yang merangkumi Lot 130. Mereka telah mencipta dan/atau memperoleh dan/atau mewarisi tanah HAAN mereka sejak tahun 1830an dan bahawa Lot 130 adalah hutan simpanan mereka atau pulau galau yang telah dilindungi selama beberapa generasi, sebelum pengeluaran hakmilik kepada plaintif. Adalah kes yang diplidkan oleh plaintif bahawa di sebalik dakwaan itu, rumah panjang Rumah Chabu dan Rumah Ramba tidak berada di dalam sempadan Lot 130, juga defendan tidak mengusahakan tanah tersebut. Suatu masa pada bulan Julai 2015, defendan mengambil alih Lot 130. Plaintif mendakwa bahawa defendan telah memasuki Lot 130 secara tidak sah dan berada dalam penghunian salah. Plaintif berusaha untuk mendapatkan kembali hakmilik Lot 130 dan perintah untuk menghalang defendan memasuki tanah tersebut dan ganti rugi. Defendan memfailkan tuntutan balas dan meminta beberapa relif, antara lain, pengisytiharan bahawa mereka telah membuat, memperoleh dan mewarisi tanah HAAN mereka sejak tahun 1830an dan bahawa pengeluaran Lot 130 kepada plaintif, sejauh kawasan di bawah tanah tersebut bertindih dan/atau meliputi tanah HAAN defendan, adalah tidak sah, tidak wajar, tidak berperlembagaan dan oleh itu tidak sah dan batal kerana mahu memusnahkan HAAN defendan di atas tanah tersebut. Defendan juga memfailkan prosiding pihak ketiga, pada dasarnya menyatakan bahawa pemindahan kepada plaintif Lot 130 adalah tidak sah, tidak berperlembagaan dan oleh itu tidak sah dan batal kerana pengeluaran hakmilik tersebut tanpa terlebih dahulu mendapat persetujuan mereka, dan bahawa peruntukan Kanun Tanah Sarawak mengenai pampasan tidak dipatuhi ketika tiada pemusnahan HAAN defendan atas Lot 130. Plaintif dan pihak ketiga memohon di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menentukan persoalan awal undang-undang tertentu. JC yang bijaksana berpendapat bahawa kedua-dua permohonan sesuai untuk diputuskan secara terus. JC yang bijaksana telah membatalkan pembelaan defendan dan tuntutan balas terhadap plaintif dan membenarkan tuntutan plaintif. Begitu juga, JC

yang bijaksana telah membatalkan pernyataan tuntutan defendan terhadap pihak ketiga. Oleh itu, rayuan ini oleh defendan.

Diputuskan, menolak rayuan:

(1) JC yang bijaksana dengan tepat membuat kesimpulan bahawa fakta dan pengakuan yang tidak dipertikaikan yang dibuat oleh defendan dengan jelas daripada pliding dan afidavit, adalah komprehensif dan mencukupi untuk menentukan dan memutuskan isu-isu teras dalam tuntutan tersebut. Tidak ada dasar dalam dakwaan defendan bahawa tuntutan mereka terhadap HAAN melibatkan pertikaian fakta material yang harus melalui perbicaraan wajar. Defendan telah membuat beberapa pengakuan kehakiman dalam pengakuan mereka yang berada di kedudukan yang lebih tinggi daripada pengakuan keterangan. Pengakuan yang dibuat oleh defendan mengesahkan pendapat plaintif bahawa rumah panjang Rumah Ramba dan Rumah Chabu tidak berada dalam sempadan Lot 130. Pliding tersebut tidak menunjukkan terdapat dakwaan fakta yang bertentangan. Tidak ada fakta material yang dipertikaikan atau fakta yang seharusnya tidak dipertikaikan yang akan menjadikan permohonan di bawah A 14A KKM tidak sesuai. Tidak ada juga isu fakta yang terkait dengan isu undang-undang yang dibangkitkan. Persoalan undang-undang yang diajukan oleh plaintif dan pihak ketiga jelas dan nyata, dapat dilihat dari pliding. JC yang dipertikaikan telah memutuskan dengan tepat bahawa persoalan undang-undang yang diajukan sesuai untuk penentuan tanpa perbicaraan penuh dan penentuan tersebut akan muktamad untuk keseluruhan tuntutan dan tuntutan balas (lihat perenggan 34, 36–37, 41 & 50–52).

(2) Defendan tidak menunjukkan bahawa HAAN mereka telah dibuat di atas Lot 130 dengan cara yang ditentukan di bawah s 5(2) Kanun Tanah Sarawak. Pemidahan Lot 130 kepada plaintif telah berlaku bahkan sebelum defendan menulis surat kepada Ketua Menteri melalui surat bertarikh 7 Januari 2015 untuk meminta pembatalan pajakan sementara. Defendan mengetahui pemberian pajakan sementara yang diberikan kepada plaintif sejak 22 Julai 2013 tetapi tidak melakukan apa-apa untuk menegaskan HAAN mereka ketika itu. Walaupun defendan mendakwa bahawa HAAN mereka atas Lot 130 telah dibuat dan/atau diperoleh sebelum 1 Januari 1958 dan masih wujud, defendan tidak diberi hakmilik atas tanah tersebut. Seksyen 132 Kanun Tanah Sarawak yang berkaitan dengan hakmilik tidak boleh disangkal plaintif tetap terpakai dan tuntutan HAAN tidak mengalahkan hakmilik tidak boleh disangkal plaintif. Tidak ada sebab mengapa kes itu mesti dibicarakan atas isu khusus ini (lihat perenggan 58–59).

(3) Setelah mempertimbangkan semua keterangan dan autoriti, pliding dan

afidavit defendan atas dakwaan mereka melakukan urusan dengan syarikat kayu, untuk menunjukkan dakwaan penguasaan yang mereka lakukan terhadap Lot 130, belum dibuktikan oleh mereka. Oleh kerana keputusan dalam *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 telah dibatalkan oleh Mahkamah Rayuan, pendapat defendan bahawa keputusan tersebut mewakili kedudukan undang-undang yang betul berkaitan dengan tuntutan atas tanah HAAN tidak dapat dipertahankan (lihat perenggan 71 & 76).

(4) Dengan status undang-undang pemakai menoa dan pulau galau telah ditetapkan dengan tegas oleh Mahkamah Persekutuan dalam kes *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 untuk tidak mempunyai kekuatan undang-undang, maka amalan adat tersebut tidak mewujudkan hak atau pemilikan kepada Lot 130 dan mereka tidak boleh dijadikan alasan tuntutan HAAN. Oleh kerana defendan tidak mempunyai hak HAAN di dalam atau di atas Lot 130, unsur pemusnahan tidak relevan. Oleh itu, tidak ada tindakan tidak berperlembagaan oleh pihak ketiga atas dakwaan tuntutan yang dibuat oleh defendan. JC betul dalam penemuannya bahawa defendan tidak mempunyai kausa tindakan untuk bertindak terhadap pihak ketiga untuk menuntut HAAN atas Lot 130 (lihat perenggan 87).]

Cases referred to

Bank Kerjasama Rakyat Bhd & Ors v Haji Mat @ Mat Shah bin Haji Ahmad @ Sapuan [2007] 3 MLJ 541, HC (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149, FC (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (folld)

Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals [2017] 4 MLJ 42; [2017] 5 CLJ 389, FC (refd)

Director of Sarawak and 2 Ors v Nicholas Mujah Anak Ason and 2 Ors Application No 08–130–03 of 2014(Q) (unreported), FC (refd)

Douglas Ding Jangan & Ors (suing on behalf of themselves and also as representatives of all the residents of Uma Long Bangan) v Government of Sarawak & Ors [2018] 5 MLJ 228; [2018] 7 AMR 156, CA (folld)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812, CA (refd)

Government of Sarawak & Anor v Busing ak Jali & Ors and another appeal [2019] 3 MLJ 100, CA (folld)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766; [2014 9 CLJ 733, FC (refd)
Jeli anak Naga & Ors v Tung Huat Pelita Niah Plantation & Ors and another appeal [2018] MLJU 1349; [2018] 7 AMR 209, CA (folld)
Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31; [2014] 7 CLJ 597, FC (refd)
Narinder Kaur v Deyoh bin Opong & Ors [1997] MLJU 169; [1997] 2 CLJ 895, HC (refd)
Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors [2010] MLJU 2212; [2010] 10 CLJ 383, HC (refd)
Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591; [2002] 2 CLJ 543, HC (refd)
Seloga Sdn Bhd v UEM Gynisys Sdn Bhd [2007] 7 MLJ 385; [2008] 2 CLJ 686, CA (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77, FC (refd)
TR Aling ak Anggau & Ors (suing for and on behalf of the residents of Rh Aling) v Government of Malaysia & Ors [2013] 10 MLJ 131, HC (refd)
Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)
Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478; [2014] 6 CLJ 285, FC (refd)

Legislation referred to

Federal Constitution art 160
Land Code (Cap 81) ss 5(2), 132
Land Surveyors Ordinance 2001 (Cap 40)
Malaysian Palm Oil Board Act 1998
Rules of Court 2012 O 14A, O33 r 2

Appeal from: Suit No MYY-22NCVC-11/8 of 2016(HC) (High Court, Miri)

Simon Siah SY Jen (Simon Siah, Chua and Chow) in Civil Appeal

Nos Q-02(IM)(NCVC)-2507–12 of 2017 and Q-01(IM)(NCVC)-476–12 of 2017 for the appellants.

Gabriel Kok (Khoo & Co) in Civil Appeal No Q-02(IM)(NCVC)-2507–12 of 2017 for the respondent.

Mohd Adzrul Adzlan (State Legal Advisor, State Attorney-General's Chambers, Sarawak) Civil Appeal No Q-01(IM)(NCVC)-476–12 of 2017 for the first, second and third respondents.

Nor Bee Ariffin JCA:

THE APPEALS

[1] These two Appeals No Q-01(IM)(NCVC)-476–12 of 2017 (Appeal No 476) and No Q-02(IM)(NCVC)-2507–12 of 2017 (Appeal No 2507) emanate from the decision of the learned judicial commissioner (JC) on 3 November 2017 in allowing the applications by the respondent and the third parties under O 14A of the Rules of Court 2012 ('the ROC') in encls 51 and 69 respectively, to have certain preliminary questions of law determined. The learned JC was of the opinion that the two applications were amply suitable to be disposed of summarily.

[2] In granting the application in encl 51, the learned JC had struck out the appellants' defence and counterclaim against the respondent and allowed the respondent's claims. The appellants' appeal against this decision is the Appeal No 2507.

[3] Similarly, as regards encl 69, the learned JC had struck out the appellants' statement of claim against the third parties. The appellants' appeal against this decision is the Appeal No 476.

[4] We heard the two appeals together because of overlapping issues and there are common questions of law. We have carefully considered learned counsels' oral and written submissions and the appeal records. We find no appealable error in the learned JC's findings and application of the law to warrant our intervention. We unanimously affirmed the decisions of the learned JC and dismissed the appellants' appeals. We now give our reasons.

[5] For convenience, the parties will be referred to as they were before the High Court.

THE BACKGROUND FACTS

[6] The plaintiff is the registered proprietor of the parcel of land situate at between Sungai Liam and Sungai Nyabor, Bakong, Sarawak containing an area

of approximately 707 hectares and described as Lot 130 Block 3 Bakong Land District, Sarawak (Lot 130). Lot 130 was formerly a provisional lease described as Lot 236 Bakong Land District registered in the plaintiff's name on 15 April 2013 (provisional lease). On 2 September 2014 the provisional lease was replaced with the issue of document of title for Lot 130.

[7] The plaintiff said that in order to comply with the title conditions that Lot 130 must be fully planted with oil palm crops by 15 April 2018, they had commenced the preliminary works, including setting up camps buildings for workers and machineries.

[8] By a letter dated 7 January 2015 to the Chief Minister of Sarawak, the defendants who are Iban by race together with Tuai Rumah Chabu ak Makum of Rumah Chabu, had asked for the revocation of the provisional lease. The letter was copied to the plaintiff.

[9] In the second half of January 2015, the defendants led by the first defendant ('D1') came to the plaintiff's camp on Lot 130 and stopped the plaintiff's contractor's workers from doing their work. D1 is the *tuai rumah* of Rumah Ramba of Sungai Liam.

[10] The defendants claimed that they were at all material times the proprietors, occupiers, holders and claimants of native customary rights ('NCR') of land situate at or around Sungai Liam, Bakong, Sarawak which include Lot 130. They had created and/or acquired and/or inherited their NCR land since 1830s and that Lot 130 was their reserved forest or *pulau galau* which have been reserved for many generations, well before the issuance of the title to the plaintiff.

[11] It was the plaintiff's pleaded case that despite the allegations that the defendant owned NCR over Lot 130, the longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of Lot 130, nor did the defendants cultivate the said land. Lot 130 was formerly under a timber licence with forestry activities since 1994.

[12] There were efforts made by the Resident's Office, Miri to facilitate amicable discussion with the inhabitants and representatives of Rumah Chabu, the defendants and the plaintiff. The plaintiff pleaded that the inhabitants of Rumah Chabu had settled amicably and that they had acknowledged the plaintiff's ownership of Lot 130 and even issued a letter dated 26 February 2015 to confirm the same. The defendants however refused to settle.

[13] Sometime in July 2015, the defendants took possession of Lot 130.

[14] The plaintiff claimed that the defendants had illegally entered into Lot 130 and was in wrongful occupation thereof. In the statement of claim ('SOC'), the plaintiff sought to recover the possession of Lot 130 and an injunction to restrain the defendants from entering the said land and damages.

[15] The defendants' defence was that the issuance of title of Lot 130 to the plaintiff was null and void as it overlapped and/or covered the defendants' NCR land. As the rightful owners, the defendant said they did not require licence or consent from the plaintiff when entering their own NCR land. Conversely, it was the plaintiff who was guilty of encroachment onto the defendants' NCR land.

[16] The defendant filed a counterclaim and sought several reliefs, amongst others, a declaration that they had created, acquired and inherited their NCR land since 1830s and that the issuance of Lot 130 to the plaintiff, in so far as the extent of the area under the said land overlapped and/or covered the defendants' NCR land, was unlawful, improper, unconstitutional and therefore null and void for want of extinguishment of the defendants' NCR over the said land.

[17] The defendants also filed third party proceedings, claiming in essence that the alienation to the plaintiff of Lot 130 was unlawful, unconstitutional and therefore null and void as the issuance of the title was without first obtaining their prior informed consent, and that the provisions of Sarawak Land Code (Cap 81) on compensation was not followed when there was no extinguishment of the defendants' NCR over Lot 130. The reliefs sought were substantially the same as in the counterclaim.

[18] The third parties' defence relied on the decision of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 and *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149, to state that *pemakai menoa* and *pulau galau* are not customs and usage which have the force of law, and hence no NCR could have been created over this area. The third parties also contended that the issuance of the provisional lease now known as Lot 130 was in accordance with the Sarawak Land Code.

[19] In encl 51, the following three questions of law were framed for determination:

(a) whether the Plaintiff who is the registered proprietor of Lot 130 Block 3 Bakong Land District by virtue of the issue document of title for the Lease of State Land over Lot 130 Block 3 Bakong Land District issued by the Superintendent of Lands and Surveys; holds an indefeasible title;

(b) whether the Defendants who are claiming that native customary rights over the Plaintiff's Lot 130 Block 3 Bakong Land District by virtue of the Defendants' allegation that the same area is their customary forest reserve; does such a custom even if proven, have any force of law against the Plaintiff;

(c) whether the Defendants, who do not have any settlement or cultivation on the Plaintiff's Lot 130 Block 3 Bakong Land District; are entitled as a matter of law to claim native customary rights over the said Lot 130 Block 3 Bakong Land District.

[20] The parties filed three affidavits each in this application. The plaintiff's affidavits were affirmed by Sim Kuang Heng, their operation manager (encls 52, 57 and 62). The defendants' affidavits were affirmed by their solicitors Siah Sy Jen (encls 56 and 61) and by D1 (encl 61).

[21] In encl 69, the question of law sought for determination reads:

> whether having regard to the pleading and the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 and *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149 the Defendants have any cause of action against the 1st, 2nd and 3rd Parties for claiming native customary rights over forested area, which are still primary forest.

[22] This application was supported by affidavits affirmed by Catherine Uno ak Sebastian Janting who is a Land Officer with the Land and Surveys Department, Miri Division (Catherine/encl 71)) and by Alexius bin Andrew who is an Assistant Photogrammentry Officer at the Land and Survey Department Headquaters (Alexius/encls 70 and 82). D1 filed an affidavit in opposition (encl 78).

GROUNDS OF APPEAL

[23] The grounds of appeal in essence are similar for both the appeals except that for Appeal No 476, there is an additional ground relating to the aerial photograph interpretations. For ease of reference, the grounds of appeals are summarised below:

(a) the action ought to go for a proper trial and not by way of affidavits as the defendants' claims over NCR involved critical issue of facts and law;

(b) the learned JC should not have relied on the decision in *TR Sandah ak Tabau* because that decision is not the correct principle of law as there was no majority decision on the questions of law posed in the Federal Court and that the decision is only confined to the facts of the case itself;

(c) the learned JC should have followed the decision in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769 and *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 which is still the correct position of law pertaining to claims over NCR land;

(d) the learned JC erred in law in not appreciating that the issuance of title over unextinguished NCR land is illegal, null and void under the Sarawak Land Code and such area of the land that is encumbered by NCR land ought to be excised out of the land title; and

(e) as regards Appeal No 476, the learned JC erred when referring and relying on the aerial photograph interpretations which was prepared by the third parties for the sole purpose of this suit and tendered only by way of affidavit when the same ought to be tendered through a proper trial.

OUR DECISION

The suitability and applicability of O 14A

[24] There are settled and established principles in our case law authorities that had firmly determined the ambit and the application of O 14A of the ROC (to cite a few, see *Seloga Sdn Bhd v UEM Gynisys Sdn Bhd* [2007] 7 MLJ 385; [2008] 2 CLJ 686; *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299; *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 (COA) which was approved by the Federal Court in *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 7 CLJ 597, *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812, *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals* [2017] 4 MLJ 42; [2017] 5 CLJ 389).

[25] The cornerstone of the defendants' defences (SOD), the counterclaim and the claim against the third parties centred on the defendants' claim that they had acquired and/or created NCR over Lot 130 long before the issuance of the provisional lease to the plaintiff by the third parties. At para 25 of the counterclaim and para 5 of the statement of claim against the third parties (SOC against the third parties), the defendants particularised their ancestors' occupancy as reproduced below:

(a) that the defendants had created and acquired the NCR Land since 1830s which is much earlier than 1.1.1958. The issuance of the said Lease to the plaintiff was just recently in the year 2014;

(b) the defendants are all from Rumah Ramba which is in close proximity to the said Lease or land in dispute coloured in yellow in the map M. The approximate distance to the closest point of the said Lease from Rumah Ramba is only about a few minutes walk;

(c) the areas within the said Lease is within the *pemakai menua/menoa* (territorial domain) of the defendant and consist of *pulau galau* (reserved forest) and *temuda*;

(d) the first Tuai Rumah who occupied the said NCR Land was TR Jampo anak Dawi who first settled at Tembawai Lubuk Nibong in the early 1830s. Tembawai Lubuk Nibong is located just next to the said Lease. At the said Tembawai Lubuk Nibong, there is also a Pendam Lubok Nibong not far away;

(e) TR Jampo anak Dawai moved within the *pemakai menua/menoa* to Tembawai Sirih and was later replaced by TR Limpeng anak Jampo. TR Limpeng anak Jampo also moved within the *pemakai menua/menoa* to Tembawai Sabut. At Tembawai Sabut he was replaced by Rundang anak Jampo. TR Rundang anak Jampo moved to three areas within the *pemakai menua/menoa* namely Tembawai Sungai Labi, Tembawai Jipon and Tembawai Pisang;

(f) TR Rundang anak Jampo was replaced later by TR Empaga anak Ambau at Tembawai Pisang. The villagers later moved to Tembawai Angus sometime in 1985 led by the ex-TR Bundan anak Limpeng. Tembawai Angus was named as such because the longhouse at that time was burnt down and therefore the villagers had to move to the current location which is not far away from the Tembawai Angus;

(g) the *pulau galau* within the disputed areas were used as the hunting grounds for the defendants and their forefathers. The *pulau galau* is also used for the defendants to search for jungle produce, collect rattan and other necessities to meet the defendants' domestic needs pursuant to their adat or custom;

(h) the ancestors of the defendants had occupied the areas within the said NCR land years before 1958 pursuant to and by virtue of their adat or customs as Ibans of Sarawak. The defendants have never abandoned their NCR over the said NCR Land;

(i) the defendants' NCR over the said Lease was also recognised by the Sarawak Government even in 1939;

(j) the defendants' ancestors were also given identity cards dated back in 1912 which show that they have been residing along Sungai Liam, Bakong, Baram;

(k) the defendants had cultivated part of the said NCR Land as their gardens, farms and plantations even before the said Lease was issued and before the plaintiff encroached into the defendants' said NCR Land.

[26] At para 26 of the counterclaim and para 7 of the SOC against the third parties, the defendant pleaded that from the NCR land, which comprises of farmland and forest, the defendants derived food, valuable medicines, wildlife and other forest produce for their livelihood and sustenance. They also farmed, cultivated and planted padi, fruit trees and recently, palm oil and other essential trees and crops on the said NCR land necessary for their survival as a community.

[27] The map marked 'M' was intended to illustrate the approximate delineation of the boundary of their NCR land and the extent of it, their settlement of Rumah Ramba and the river Sungai Liam which separates Rumah Ramba from Lot 130.

[28] Given the long historical facts regarding the occupancy of the NCR land by the defendants' forefathers that went way back to the 1830s, learned counsel for the defendants argued that there was obviously disputed questions of fact and triable issues, which disentitled the filing of encls 51 and 69.

[29] The defendants claimed they had amply demonstrated in their pleadings why their claim of NCR on Lot 130 should rank priority over and supersede the plaintiff's right as the registered proprietor and therefore, the preliminary determination of the questions of law was not the appropriate procedure. In submitting the way that he did, learned counsel for the defendants took the position, as we understood it to be, that for cases involving issues of NCR, there ought to be proper examination of the facts through a proper trial and the court should abstain from deciding the cases summarily. We however take a different view.

[30] As stated by the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*, even if the case appears to be or is complicated, the court must not shun from considering the applicability of O14A and O33 r 2 of the ROC in relation to the questions posed. A case involving a claim on NCR, in our view is no exception. Everything boils down to the question of whether the requirements for summary determination of the questions of law are present and satisfied, based on the relevant facts and circumstances of each case.

[31] The test of whether the question of law or construction is suitable to be determined under O 14A was dealt with by the Federal Court in *Racha Urud* at p 403 wherein reference was made to the commentary on O 14A appearing in the *Malaysian Court Practice (Practitioner Edition)* at pp 125–127 which

states — 'The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action ...'.

[32] In *Racha Urud* the Federal Court held that an application under O 14A is to decide clear points of law or construction apparent on the pleadings and one primary task which must be undertaken by the court in deciding on the suitability and applicability of the order is to consider whether the pleadings disclose any dispute on the material facts. The apex court observed that 'pleadings must cover a wide range of cause papers. The only cause papers available in our instant case are the statement of claims, the defence, reply and the affidavits in support of the O 14A applications' (see also *Bank Kerjasama Rakyat Bhd & Ors v Haji Mat @ Mat Shah bin Haji Ahmad @ Sapuan* [2007] 3 MLJ 541 where the High Court held that the scope of enquiry in an O 14A application includes an examination of the affidavit evidence).

[33] It may be useful to briefly refer to the following excerpt from the *Malaysian Civil Procedure 2015* (Sweet & Maxwell) at p 130 on the principles governing the application of O 14A:

> The outcome of an application under Order 14A does not need to dispose of the entire case. It is sufficient if substantial matters in the case can be disposed of: *Petroliam Nasional Bhd & Anor v Kerajaan Negeri Terengganu* [2003] 5 AMR 696; [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA; of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2008] 1 AMR 105. The issue to be determined should be a core legal issue that may for practical purposes turn out to be determinative of the case; *Rockwin Enterprise Ltd v Shui Yee Ltd* [2003] 3 HKC 174 at 184; *Netwell Properties Ltd v JCG Finance Co Ltd* [2003] 4 HKC 566, CA (HK).
>
> An application under Order 14A is inappropriate if:
>
> (a) There are conflicting allegations of fact. All material facts relating to the subject matter of the claim must be undisputed or admitted; and not on the basis of assumed facts. If cannot be invoked on the basis of assumed facts. The court should not give a ruling under Order 14A in vacuo or based on hypothetical facts: ...
>
> (b) The issues of fact are interwoven with legal issues raised. The court will not split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling; ...

A The court will in an Order 14A application determine the issues of law upon the construction of documents whenever it appears to the court that the determination of any question of law will lead to a final conclusion of the action because there are no facts in dispute: *Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors* [2008] 4 MLJ 448; [2008] 4 AMR 553.

B

[34] We had carefully perused the pleadings and the affidavits by the plaintiffs, the defendants and the third parties. It was obvious to us from the grounds of judgment that His Lordship had scrutinised the pleadings and the affidavits of the parties as he ought to have done, in his attempts to identify the C material facts pleaded which are obviously undisputed or ought not to have been disputed (*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*). The learned JC had rightly concluded that the undisputed facts and admissions made by the defendants as apparent from the pleadings and the affidavits, were comprehensive and sufficient to determine and dispose of the core issues in the D claim.

[35] On the facts before us, there is no dispute that the plaintiff is the registered proprietor of Lot 130. The provisional lease was registered to the plaintiff on 15 April 2013 and subsequently converted to Lot 130 on E 2 September 2014. The defendants knew of the plaintiff's title over Lot 130 since 22 July 2013 (see para 22 of the SOC against the third parties). The defendants together with Tuai Rumah Chabu ak Makum of Rumah Chabu had, by a letter dated 7 January 2015 to the Chief Minister, asked for the revocation of the provisional lease (para 4.1 of the SOC and admitted by the F defendants in para 7 of the SOD). The defendants have no title to Lot 130.

[36] Although at a glance there may appear to be a competing claim between the parties with the defendants demonstrating the long historical facts on the defendants' ancestors' occupancy to justify why their claim of NCR on Lot 130 G should rank priority over and supersede the plaintiff's right as the registered proprietor, nothing really turned on this. We see no substance in the defendants' contentions that their claims over NCR involved material disputes of facts that ought to go for a proper trial, for the following reasons.

H

[37] The defendants had made several admissions in their pleadings. These are judicial admissions. It is trite that judicial admissions in a pleading stand on a higher footing than evidentiary admission (*Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478; [2014] 6 CLJ 285).

I

[38] In para 4.2 of the SOC, the plaintiff pleaded the following:

> 4.2 The longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of the said Land. The Resident's Office, Miri helped to facilitate amicable discussion. After discussion with the inhabitants and representatives of

Rumah Chabu, the Plaintiff and the inhabitants of Rumah Chabu settled amicably; and Rumah Chabu acknowledged the Plaintiff's ownership of the said Land. The inhabitants of Rumah Chabu issued a letter dated 26.2.2015 to confirm the above.

The defendants' response can be seen at para 8 of the SOD which reads:

8. In reference to paragraph 4.2, save for the longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of the said Land and the meeting facilitated by the Resident's Office, the Defendants have no knowledge of the arrangement made by the residents of Rumah Chabu with the Plaintiff and the Plaintiff is put to strict proof hereof.

[39] The plaintiff also pleaded at para 15.3 of the SOC the following:

15.3 The Defendants allege that they own native customary rights over the said Land. However, the Defendants' settlement is not on the said Land nor do the Defendants cultivate on the said Land. In fact, the said Land was formerly under a Timber Licence with forestry activities since 1994.

The defendants' response at para 20 of the SOD reads:

20. Paragraph 15.3 is admitted and the Defendant aver that the said Land were the Defendants' reserved forest or *pulau galau* which have been reserved for many generations. The said *galau pulau* were only logged by the timber company who had asked permission from the defendants before the logging activity started. The defendant in fact gave permission or consent for the logging to be carried out in exchange for the logging company to assist the Defendants to build a road in their communal boundary (*pemakai menua*).

[40] What the terms *temuda*, *pemakai menoa* and *pulau* denote were described by Raus Shariff PCA (as His Lordship then was) in *TR Sandah ak Tabau* in these words:

[27] the terms 'temuda', 'pemakai menoa', and 'pulau' were extensively discussed by the Court of Appeal in Appeal No 27. What emerged from the discussion is simply this; 'temuda' denote the native custom of cultivating an area; 'pulau' denote the native custom of setting aside and maintaining an area under primary forest from which they derived food, medicines, wildlife and other forest produce; and 'pemakai menoa' denote the native custom of demarcating an area by the native community, both cultivated area and area set aside.

[41] Very significantly, the admissions made by the defendants were that firstly, their claim for NCR over the plaintiff's Lot 130 was as their forest reserve or *pulau galau*. This *pulau galau* was used as the hunting grounds for the defendants and their forefathers and to search for jungle produce, collect rattan and other necessities to meet the defendants' domestic needs pursuant to their *adat* or custom. Secondly, they did not have any settlement nor any cultivation

on the plaintiff's Lot 130. The defendants only built small huts there for hunting or for gathering jungle produce. This confirmed the plaintiff's contention that the longhouses of Rumah Ramba and Rumah Chabu do not lie within the boundaries of the Lot 130.

[42] Further admissions as regards the defendants' *pulau galau* can also be gleaned from the affidavit evidence. Sim Kuang Heng deposed at para 4 in encl 57 the following:

> 4. I repeat that the Defendants do not have any settlement nor any cultivation on the said Land Lot 130 Block 3 Bakong Land District.
>
> The said Land lies outside of Sungai Liam, on the right bank of Sungai Liam. This can be seen on the Defendants own map 'M'.
>
> The Defendants' settlement of Rumah Ramba lies on the left bank of Sungai Liam. This can be seen on the Defendants own map 'M'.
>
> Rumah Ramba from across the river Sungai Liam to the closet (sic) point of the said Land is at least one (1) kilometre away. This can be seen on the Defendants own map 'M'.
>
> Therefore the Defendants' own settlement of Rumah Ramba do not lie within the said Land. Nor do the Defendants have or had any cultivation on the said Land.

[43] In his affidavit in reply in encl 61, D1 again admitted that the defendants do not have any permanent settlement on Lot 130:

> 5. Reference to paragraph 4 of Encl 57, I admit that the Defendants do not have any permanent settlement in the said Lease Lot 130 but the said Lease Lot 130 was occupied by the Defendants and the Defendants had control over the said area wherein the Defendants have reserved for many generations and timber companies who wishes to log in the said Land was required to ask permission from the Defendant. Prior to this, the Defendants have in fact gave permission or consent for the logging to be carried out in the said area in exchange for the logging company to assist the Defendants to build a road in their *pemakai menua*. Furthermore, within the said land, the Defendants built small huts whereby the Defendants used to go for hunting or for gathering jungle produce.

[44] The defendant's map marked 'M' showed several undisputed facts. As was the finding of facts by the learned JC, the defendants' own settlement of Rumah Ramba do not lie within the boundaries of the plaintiff's Lot 130. Rumah Ramba and Rumah Chabu and the plaintiff's Lot 130 are separated by Sungai Liam. This river runs outside of Lot 130. Rumah Ramba is located at least one kilometre distance away from the nearest boundary point of Lot 130.

[45] The map marked 'M' is entitled 'PETA MENUNJUKKAN SEMPADAN KAWASAN TANAH HAK ADAT BUMIPUTRA (NCR)

RUMAH RAMBA, SUNGAI LIAM DAN RUMAH CHABU, LEPONG AJAI, BAKONG, DAERAH MARUDI, BAHAGIAN MIRI, SARAWAK'. The communal map concerned claims for NCR not just by Rumah Ramba but also Rumah Chabu. The 'NOTA' shows that 'Luas kawasan tanah NCR Rumah Ramba dan Rumah Chabu ialah lebih kurang 3,564.33 hektar' and 'Luas kawasan yang dituntut oleh Rumah Ramba dari Asco Green ialah 876.45'. The defendant admitted, in para 9 of the SOD, to the fact that they had refused the plaintiff's offer on 6 February 2015 for ex gratia settlement upon the same terms as that of Rumah Chabu. Although the defendants pleaded in para 8 that they did not have knowledge of the arrangement made between Rumah Chabu and the plaintiff as regards the amicable settlement, by the admission in para 9 of the SOD, the defendant ought to have knowledge that Rumah Chabu had acknowledged the plaintiff's ownership of Lot 130 and that there was no claim now by Rumah Chabu that Lot 130 was part of their NCR.

[46] We need to point out that while the accuracy of the map marked 'M' was not an issue with the plaintiff, the admissibility of the same was objected to by the third parties on the ground that it was not produced or drawn by a land surveyor licensed under the Land Surveyors Ordinance 2001 (Cap 40) nor was it approved by the Director of Lands and Surveys. The defendants at the other end, raised objection to the learned JC's reference and reliance on the aerial photographs and the interpretation, saying that they should be tendered through a proper trial.

[47] There is no dispute that the map marked 'M' was not prepared by a licenced land surveyor. It was prepared as a community map to show the locality of the area claimed by the defendants.

[48] However, it must be borne in mind that the learned JC had made reference to and reliance on the communal map in respect of encl 51 and rightly so as the same was an uncontroverted piece of evidence as between the plaintiff and the defendants.

[49] With regard to encl 69, the grounds of judgment would show that the communal map marked 'M' was not considered by the learned JC and did not form part of his decision. It was the aerial photographs that the learned JC had considered and the affidavits filed in relation thereto which again were uncontroverted, as will be seen later in this judgment.

[50] As regards the plaintiff's claim at para 15.3 of the SOC that the entire area which include Lot 130 was formerly under a timber licence with forestry activities since 1994 and the defendant's plea in para 20 of the SOD that their *pulau galau* were only logged by the timber company who had obtained

permission from the defendants before starting the logging activities, the pleadings in our view do not show there were conflicting allegations of facts. The fact remained undisputed that there were logging activities carried out on Lot 130.

[51] Thus far, from a factual perspective, it is apparent that there were no disputed material facts or facts which ought not to have been disputed that would render the application under O 14A inappropriate. We hasten to add that there was also no issues of fact interwoven with legal issues raised. The undisputed fact about the defendants' use of Lot 130 as their *pulau galau* is of great significance because the questions of law posed in encl 51 turned on the issues of whether the defendant as a matter of law could claim NCR over Lot 130 and whether the NCR the defendant is claiming over the *pulau galau*, even if it is proven, has the force of law in light of the decided cases by our apex court. Even the grounds of appeal provide clear indications that there are emplaced pronouncements of law by our appellate courts over the questions of law posed.

[52] The questions of law posed by the plaintiff and the third parties are in our view clear cut and definite, discernible from the pleadings. The learned JC had correctly decided that the questions of law posed are suitable for determination without the full trial of the action and such determination would be final as to the entire claim and the counterclaim.

[53] We shall now proceed to look at the questions of law posed by the plaintiff.

First question: Whether the plaintiff who is the registered proprietor of Lot 130 Block 3 Bakong Land District by virtue of the issue document of title for the lease of State Land over Lot 130 Block 3 Bakong Land District issued by the Superintendent of Lands and Surveys, holds an indefeasible title?

[54] The learned JC answered this question in the affirmative. His Lordship cited the decisions in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383, *Narinder Kaur v Deyoh bin Opong & Ors* [1997] MLJU 169; [1997] 2 CLJ 895, the Federal Court case of*Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766; [2014 9 CLJ 733 and the recent Federal Court case of *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 to support his conclusion that upon being alienated with the issue of document of title over Lot 130, the plaintiff became a registered proprietor thereof and its title is indefeasible and can no longer be challenged by the defendants' NCR claims.

[55] The ambit and effect of s 132 of the Sarawak Land Code and the indefeasibility of title conferred by the said provision was clearly established by the Federal Court in *TH Pelita Sadong*. The issues common to all parties in the appeals before the Federal Court in *TH Pelita Sadong* are, what is the effect of a claim of NCR on the indefeasibility of title under the Sarawak Land Code and whether the positive finding of the existence of NCR would overrule the indefeasibility of title of land and the interest stated in the issue document of title issued after NCR was asserted, or would indefeasibility of title of the land prevail over such claim of NCR. The Federal Court held that s 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over a land in the manner prescribed under the Sarawak Land Code and that a claim for NCR does not defeat the indefeasibility of title of land, even if the interest stated in the issue document of title was issued after NCR was asserted.

[56] At the start of his submission, learned counsel for the defendants was magnanimous in conceding before us two important aspects of these appeals. One was with regard to the issue on indefeasibility of title. Notwithstanding their written submission wherein we were referred to several case law in support of the argument that the indefeasibility of title is a critical issue of fact and law which must be determined at the trial, the defendants did not dispute that indefeasibility of title is no longer an issue in the face of the decision in *TH Pelita Sadong*. The other was that there was no dispute that Lot 130 was a primary forest. We shall deal with the primary forest issue in a later part of this judgment.

[57] The concession made by the defendants on the issue of indefeasibility only went to show that the learned JC's findings was in line with the established principles. Fraud was not an issue in the instant case. Fraud was not pleaded either against the plaintiff or the third parties. There was therefore an absence of any vitiating factor to defeat the plaintiff's right as the registered proprietor of Lot 130.

[58] The defendant had not shown that their NCR had been created over Lot 130 in the manner prescribed under s 5(2) of the Sarawak Land Code. The alienation of Lot 130 to the plaintiff had already taken effect even before the defendants wrote to the Chief Minister vide a letter dated 7 January 2015 to ask for the revocation of the provisional lease. The defendants knew of the grant of provisional lease granted to the plaintiff since 22 July 2013 but did nothing to assert their NCR then. Despite the defendants' claim that their NCR over Lot 130 was created and/or acquired prior to the 1 January 1958 and still subsists as such, the defendants were not issued with any title over the land.

[59] Even if one is to assume that the defendants had created NCR over Lot 130 in the manner prescribed under the Sarawak Land Code, or had asserted their NCR over Lot 130 before the issuance of title to the plaintiff or the interest stated in the issue document of title was issued after NCR was asserted, on the authority of *TH Pelita Sadong*, s 132 of the Sarawak Land Code pertaining to the plaintiff's indefeasibility of title remains applicable and the NCR claim does not defeat the indefeasibility of title of the plaintiff. We agreed with the submission by learned counsel for the plaintiff that the entire answer to the first question posed can be found to be on all fours with the binding precedent in *TH Pelita Sadong*. There is no reason why the case must go for trial on this specific issue.

Second question: Whether the defendants who are claiming that native customary rights over the plaintiff's Lot 130 by virtue of the defendants' allegation that the same area is their customary forest reserve, does such a custom even if proven, have any force of law against the plaintiff?

Third question: Whether the defendants, who do not have any settlement or cultivation on the plaintiff's Lot 130 Block 3 Bakong Land District, are entitled as a matter of law to claim native customary rights over the said Lot 130 Block 3 Bakong Land District?

[60] The two questions of law abovementioned are related and were taken together by the learned JC. His Lordship answered both questions in the negative. His Lordship opined that both questions could be determined based on the authority of *TR Sandah ak Tabau* where the Federal Court held that NCR claim by means of *pulau galau* and *pemakai menoa* have no force of law. The learned JC accepted *TR Sandah ak Tabau* as a binding precedent which had been applied consistently in many other cases.

[61] To recapitulate, the defendants contended that the learned JC had erroneously applied the wrong principles of law in adopting the decision in *TR Sandah ak Tabau* when he should have instead adopted the decision in *Nor Anak Nyawai* and *Madeli bin Salleh.*

[62] It was argued before us that although the outcome of the appeals in *TR Sandah ak Tabau* was a 3:1 majority in favour of the appellants but the Federal Court appeared to be split on the legal enforceability of the Iban customs of *pemakai menoa* and *pulau galau.* Learned counsel submitted that the definition of law as held by Raus Sharif PCA (as His Lordship then was) was not correct as Abu Samah Nordin FCJ, despite in agreement to allow the appeal, has held in no uncertain terms that in respect of the respondents' rights under the common law pursuant to art 160 of the Federal Constitution ('the FC'), the legal enforceability of the *pemakai menoa* and *pulau galau* was not a matter of

law but a question of fact to be established by evidence before the court, and for that matter there was no sufficient evidence to support the claims by the plaintiff on the balance of probabilities. Premised as such, His Lordship found it unnecessary to answer the questions posed for determination. Reference was also made to the dissenting decision of Zainun Ali FCJ.

[63] It was further argued by learned counsel for the defendants that the legal position on *pemakai menoa* and *pulau galau* is far from settled. The Federal Court in *Director of Sarawak and 2 Ors v Nicholas Mujah Anak Ason and 2 Ors* Application No 08–130–03 of 2014(Q) (unreported) had on 17 May 2017 granted leave to appeal on a similar question of law as regards the issue of *pemakai menoa* and *pulau galau*. Learned counsel mentioned yet another appeal pending before the Federal Court again on similar issues (he did not have the case in the bundle of authorities). Both appeals, according to him, are still pending on the date we heard these present appeals.

[64] It will be observed that the contention by learned counsel on the so called wrong principles of law handed down by the majority decision *TR Sandah ak Tabau*, is nothing new. Similar line of arguments were echoed in previous decisions of this court in *Jeli anak Naga & Ors v Tung Huat Pelita Niah Plantation & Ors and another appeal* [2018] MLJU 1349; [2018] 7 AMR 209, in *Douglas Ding Jangan & Ors (suing on behalf of themselves and also as representatives of all the residents of Uma Long Bangan) v Government of Sarawak & Ors* [2018] 5 MLJ 228; [2018] 7 AMR 156 and in *Government of Sarawak & Anor v Busing ak Jali & Ors and another appeal* [2019] 3 MLJ 100.

[65] In *Jeli anak Naga* this court speaking through Tengku Maimun Tuan Mat JCA (as Her Ladyship then was), accepted that the decision in *TR Sandah ak Tabau* was a majority decision and by the doctrine of stare decisis, it was a majority decision that the court should follow. Her Ladyship held at p 221:

> [52] By the doctrine of stare decisis, it was the majority decision that we should follow (see *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & 335 Ors* [2000] 3 AMR 3030; *Fawziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd (dahulunya dikenali sebagai Syarikat Teratai KG Sdn Bhd (No 1)* [2006] 1 MLJ 435; [2006]1 AMR 545) and it was our position that the decision of *TR Sandah* was a majority decision. We were thus not convinced that we should depart from the majority decision of the Federal Court in *TR Sandah*. Premised on *TR Sandah*, the learned judge was correct to dismiss the plaintiff's claim except for the cultivated area of 380 hectares as the plaintiff had no NCR over the balance of Lot 2 which was not cleared by the plaintiffs and/or their ancestors prior to January 1, 1958. As such, we did not see the need to consider the authorities cited on the merits of the plaintiffs' argument that the custom of 'pemakai menoa' and 'pulau' falls within the definition of law in art 160(2) of the Federal Constitution.

[66] In *Busing ak Jali* Zaleha Yusof JCA (as Her Ladyship then was) rejected a similar argument that the position was still not clear based on the judgment of Abu Samah Nordin FCJ in *TR Sandah ak Tabau*. Her Ladyship held that the Federal Court had dismissed the plaintiffs' claim in *TR Sandah ak Tabau* based on 3–1 decision.

[67] We noted that the sppeal in *Nicholas Mujah Anak Ason* is pending before the apex court. However, we are of the considered view that *TR Sandah ak Tabau* is the prevailing authority on the issues of *pemakai menoa* and *pulau galau* in that such customary practices do not have the force of law. We are also in complete agreement with *Jeli anak Naga, Douglas Ding Jangan* and *Busing ak Jali* that the decision in *TR Sandah ak Tabau* was a case of a majority 3–1 decision and the majority decision was not split. Needless to say, we are bound by the majority decision in *TR Sandah ak Tabau*.

[68] The central issue in *TR Sandah ak Tabau* is whether the Iban customs of *pemakai menoa* and the establishment of *pulau* enable the respondents in the respective cases to claim a valid NCR over the land they claimed and whether they are recognised by the laws in Sarawak. Raus Sharif PCA (as His Lordship then was) explained why the native customs of *temuda* which is cultivation of land for occupation is recognised in law and why *pemakai menoa* through the establishment of *pulau galau* do not have the force of law as can be seen from the following which we think merit reproduction:

> [64] With respect we disagree. This is not a case where we are called upon to consider whether such a practice exist or otherwise. Rather, what is pertinent here is whether the practice which exist has any force of law. In art 160(2) of the Federal Constitution, 'Law' is defined as follows:
>
> Law includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law.
>
> [65] The words 'having the force of law' in art 160(2) of the Federal Constitution are highly important as these words qualify the types of customs and usages which could come under the definition of law. These important words 'having the force of law' must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.
>
> [66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak state laws which has been defined to mean 'customs which the laws of Sarawak recognise'. This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under art 160(2) of the Federal Constitution.

[67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in the case of *Nor Anak Nyawai* wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of 'temuda' which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.

[77] Based on what we have discussed above, the native customs of 'pemakai menoa' through the establishment of 'pulau' falls short of the prerequisites as provided for under s 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art 160 of the Federal Constitution.

[79] For reasons adumbrated, we would answer the Question 1 in the negative. We find that the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in the primary forest which natives, like the respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce.

[80] As to Question 2, our answer is that the High Court and the Court of Appeal are not entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom of 'pemakai menoa' and 'pulau'. What the law of Sarawak had recognised in a claim for native customary rights is the custom or adat of 'temuda'.

[81] As to the Question 3, we would answer it in the affirmative. The Court of Appeal's decision in *Nor Anak Nyawai* that the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native of rights to land claimed under native customary rights in Sarawak.

[69] The learned JC has applied the correct law in arriving at his findings that both questions of law could be determined based on the authority of *TR Sandah ak Tabau*.

[70] It is trite that NCR claims are founded upon the concept of native's custom of continuous and unbroken occupation and once abandoned, whatever NCR was created or acquired previously over that land would be lost (see *Bisi ak Jinggot*; *Racha Urud*; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555; *Douglas Ding Jangan*). The effect of the defendant's claim that they had consented to forestry activities by timber companies on the said lot, must be critically examined. Learned counsel for the defendants argued that the Federal Court in *Madeli bin Salleh* held that occupation need not be actual occupation and there can be occupation without presence on the land so long as the natives

A have control over the land through supervision. In this context, the defendants contended that when they consented to the timber company to operate, they had demonstrated some form of control over Lot 130, the extent of which should be a matter for the trial. It is to be observed that Raus Sharif PCA (as His Lordship then was) in *TR Sandah ak Tabau* had dealt with at length with
B *Madeli bin Salleh*.

[71] Having considered all evidence and authorities referred by the parties, we are constrained to say that the defendant's pleadings and affidavits on the purported dealings they had with the timber company, so as to demonstrate the
C alleged control they exerted over Lot 130, had not made out the case they contended to be. We are not persuaded by the contention that the defendant must be given the opportunity to establish the alleged control at the trial. Whether or not there was occupation, actual or otherwise, or whether such a
D consent or permission was given to a timber company, could all be ascertained from the pleadings and the affidavits.

[72] As we had mentioned earlier, the plaintiff pleaded at para 15.3 of the SOC that Timber Licence No T/0449 was issued by the Director of Forests,
E Sarawak in 1994 to Talented Foresight Sdn Bhd until its expiry in 2011. Talented Foresight Sdn Bhd was wound up in 2013 and a liquidator was appointed on 12 November 2013 (see para 12.1 defence to counterclaim). Even though the defendants made no specific mention as to the identity of the timber company they had given permission or consent for logging to be carried
F out, it is obvious that the timber company meant by them pointed to Talented Foresight Sdn Bhd. This is because nowhere in the pleadings or the affidavits did the defendants name any particular or any other timber company that could have undertaken the logging works and there was no denial to the
G plaintiff's reference to Talented Foresight Sdn Bhd having the timber concession from 1994–2013. The defendants are bound by the perimeter of their pleadings.

[73] As Talented Foresight Sdn Bhd 's logging concession expired in 2013,
H the defendants' claim in the affidavit in encl 61 that they had even obtained a grant from the Malaysian Palm Oil Board (MPOB) to plant palm oil trees within Lot 130 is a non-starter. MPOB which was constituted under the Malaysian Palm Oil Board Act 1998 (Act 582) was only established on 1 May 2000 (Act 582 came into effect on 1 May 2000). It follows therefore that as the
I logging operations by Talented Foresight Sdn Bhd ended in the year 2011, any purported attempt by the defendants to plant palm oil would have been in the year 2012 (before the Lot 130 was alienated to the plaintiff in 2013). The plaintiff's assertion that when the plaintiff came to Lot 130 in the year 2013, there were no planted crops whatsoever therefore stands to reason. This brings

to naught the defendant's contention that the timber company had operated with their consent.

[74] *Madeli bin Salleh* does not in our view assist the defendants' case. Even if we are to weigh in the defendants' argument that pursuant to *Madeli bin Salleh*, their occupation need not be actual occupation and it would suffice as long as the defendants have control over the land through supervision and continual visitation, and even if assuming for a moment that the defendants had acquired NCR over Lot 130, which we say is not the case here, and had consented to timber loggings, undisputedly to Talented Foresight Sdn Bhd, on Lot 130 for over 20 years from 1994–2011 and followed by the provisional lease to the plaintiff on 15 April 2013, that right would have been lost. The uncontentious fact was that Talented Foresight Sdn Bhd had the benefit of the grant of timber concession that went unchallenged for that length of time. And as it concerned the plaintiff, there was also no legal actions for trespassing against them until the defendants made claim of their alleged NCR sometime in January 2015. Support for this view is found in the decision of the Court of Appeal in *Douglas Ding Jangan* where Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) said at p 169:

> [50] In addition, the learned judge found that logging had taken place for over 20 years. The concept of continuous occupation has always been recognised as an essential feature of NCR to land. In *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals* [2017] 4 MLJ 42, the respondents claimed that following the grant by the Director of Forests, Sarawak, of timber licences and licences to plant forests to the four appellants companies, the latter had trespassed onto lands over which the respondents has acquired NCR. The Federal Court held that on the facts, the respondents no longer possessed, planted or maintained their NCR lands in their previous settlements where logging activities by the appellants had been carried out for about 20 years before the commencement of the suit against the appellants. The Federal Court stated that it was inconceivable that the respondents would not have known of the presence of the logging activities on the land for over a period of 26 years had they been in occupation of the land and that the uncontradicted evidence was consistent with 'occupation'.
>
> [51] Similarly in the instant case. Given the finding of fact by the learned judge that logging had been carried out for more than 20 years, even if the plaintiffs could establish any rights, which was not the case, the plaintiffs' right would have been lost when the plaintiff permitted the land to be used by Perbadanan Perusahaan Kemajuan Kayu Sarawak, the licensee of Timber Licence Nos T/3190 and T/4176 and Kastima, the logging contractor who are not natives.

[75] We now turn to the defendants' contention that the learned JC should have followed the decision in *Nor Anak Nyawai* and *Madeli bin Salleh.*

[76] *Nor Anak Nyawai* was decided by Ian Chin J. The decision by Ian Chin

J in that case was overturned by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu* where Hashim Yussoff JCA (as he then was) held that the common feature which forms the basis of the claim for native customary rights is the continuous occupation of land and following the decision of the High Court in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543 that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance to their tradition. Such view is logical as otherwise it may mean that vast areas of land could be under native customary right simply through assertions by some native that they and their ancestors had roamed or foraged the areas in search of food'. As the decision in *Nor Anak Nyawai* was overturned by the Court of Appeal, the defendants' contention that the decision represents the correct position of law pertaining to claims over NCR land is untenable.

[77] We are mindful of the fact that in *Nicholas Mujah Anak Ason*, one of the questions for the determination of the Federal Court was whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu* was a correct statement of the law relating to the extent and nature of rights to land claimed under the NCR in Sarawak. As at the date of hearing of these appeals, there was no decision handed down by the Federal Court pertaining to the challenge on the said statement of law.

[78] The correctness of the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu* however was the subject of question 3 in *TR Sandah ak Tabau* and the same was affirmed by the majority decision as the passages below show:

> [70] The decision of the Court of *Appeal* in *Nor Anak Nyawai* was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of *Appeal* in *Nor Anak Nyawai* is the correct statement of law. It is not only consistent with decisions of our courts in *Adong* and *Sagong* but also with other commonwealth countries that *native customary* law over *land* are founded upon the concept of *native*'s custom of continuous occupation. For example, in *Sagong*, the proprietary interest of the *orang asli* in their *customary* and ancestral *land* was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs the position in *Nor Anak Nyawai* is consistent with the methods of creating *customary rights* under the Sarawak Land Code vide s 5.
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> ...
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> [75] Thus, we agree with the views adopted by the Court of *Appeal* in *Nor Anak Nyawai*. We find nothing objectionable in the views expressed by the Court of *Appeal* in that case. On the contrary, we find that the Court of *Appeal* in the present appeals had erred in failing to consider that basis on the various Orders of the Rajah that the *rights* to *land* could only be established by a *native* who had cleared the

primary jungle for the purpose of farming or cultivation. A

[79] Accordingly, the said ground of appeal lacks merit. We are bound to observe the findings above by the principles in stare decisis.

B

[80] We shall next deal with the question posed by the third parties.

Whether having regard to the pleading and the case of Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1 and Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149 the defendants have any cause of action against the first, second and third parties for claiming native customary rights over forested area, which are still primary forest? C D

[81] Notwithstanding the concession made by learned counsel for the defendants that Lot 130 was a primary forest and the aerial photographs attested to it, the defendant steadfastly maintained their objection that it was inappropriate to introduce the aerial photographs through affidavit evidence. This begs the question whether the objection could be sustained. And this entails an analysis of the third parties' case. E

[82] In support of the application in encl 69, Catherine had deposed to the following: F

> 7. Based on my office records, the aerial photographs taken in the years 1947 and 1963 of the purported areas concerning Lot 130 Block 3 Bakong Land District (formerly Provisional Lease Lot 236 Balong land District) (hereinafter referred to as the 'said Lease') claimed by the Defendants show that it is still primary forest (approx 621 Ha.) in 1947 and 2.98% (18 Ha. Approx) of the purported areas claimed as cleared area and 97.1% (603 Ha. Approx) is still primary forest in 1963. A copy of the map showing the interpretation of the aerial photographs taken in the year 1947 and 1963 over the purported areas claimed by the Defendants is now shown to me and produced hereto marked 'CU-3' and 'CU-4'. G H

[83] Alexius in his affidavit gave a detailed account of his interpretation of the aerial photographs for the year before and after 1958 over Lot 130.

[84] The essence of the affidavits of Catherine and Alexius was to establish that Lot 130 was a primary forest. Catherine's affidavit unmistakably show that the aerial photographs taken in 1947 and 1963 over Lot 130 in exhs 'CU3' and 'CU4' illustrate clearly that Lot 130 was still primary forest in 1947 and is still a primary forest in 1963. The documents are in the custody of the Lands and I

Surveys Department, Miri Division. By virtue of s 83(1) of the Evidence Act 1950, the documents are made by the authority of the Government of Sarawak and presumed to be so made and are accurate (see *TR Aling ak Anggau & Ors (suing for and on behalf of the residents of Rh Aling) v Government of Malaysia & Ors* [2013] 10 MLJ 131). The defendants had the benefit of legal representation. They however chose not to adduce any rebuttal evidence, thus rendering the documents in exhs 'CU3' and 'CU4' uncontroverted (see *Racha Urud*; *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533). The concession effectively put to rest the defendants' dispute that Lot 130 was a primary forest as well as conclusively attested to the third party's exhs 'CU3' and 'CU4'. Simply put, the status of Lot 130 being a primary forest has become an undisputed fact. If the defendants were no longer disputing that Lot 130 was a primary forest, what is there anymore to prove at the trial?

[85] We opined that the learned JC did not err when he relied on the affidavit evidence of Catherine and Alexius and in accepting exhs 'CU3' and 'CU4'. We are inclined like to think that the concession made by learned counsel would in the circumstances and most probably, have been based on the abovementioned documents.

[86] The learned JC was also correct to hold, based on the authority of *Bisi ak Jinggot* that in order to claim for NCR, there must be clearing of virgin forest by the natives and since Lot 130 claimed by the defendant was still covered by virgin jungle in 1947 and 1963 as proven by exhs 'CU3' and 'CU4', the area could not have been cultivated or occupied by their ancestors. The common thread referred to in *Bisi ak Jinggot* is undoubtedly missing.

[87] The defendants' ground of appeal that the issuance of title over unextinguished NCR land is illegal, null and void lacks merit. The law is that where the State land is encumbered by the native's NCR, no alienation shall take place until all NCR have been surrendered or terminated or provisions for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with (*Pelita Sadong*; *Bisi ak Jinggot*). With the legal status of *pemakai menoa* and *pulau galau* having been firmly established by the Federal Court in *TR Sandah ak Tabau* to have no force of law, it follows to reason that such customary practices do not create rights or ownership to Lot 130 and they cannot be grounds for claims of NCR. Since the defendants do not have any NCR rights in or over Lot 130, any elements of extinguishment are not relevant. There is therefore no unconstitutional act by the third parties for the alleged claims made by the defendants. The learned JC was correct in his findings that the defendants have no cause of action against the third parties for claiming NCR over Lot 130.

[88] As mentioned earlier, we had dismissed both appeals. No order was made as to costs. The deposit to be refunded. A

Appeals dismissed.

Reported by Ahmad Ismail Illman Mohd Razali B

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